JUL 17 2003

No. 02-1819

IN THE

Supreme Court of the United States

GOVERNMENT OF THE VIRGIN ISLANDS, *et al.*,

Petitioners,

v.

EQUIVEST ST. THOMAS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The original Respondents, Bluebeard's Castle, Inc. and Castle Acquisitions, Inc., have been merged into Equivest St. Thomas, Inc. Equivest St. Thomas, Inc. is wholly owned by its ultimate parent company, Cendant Corporation, which is publicly traded.

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Respondent Equivest St. Thomas, Inc. ("Equivest") respectfully requests that this Court deny the petition for a writ of certiorari filed by the Government of the Virgin Islands (the "VI Government") and its Tax Assessor, Roy Martin ("Martin"). The petition requests that this Court grant a writ, vacate and remand the decision of the United States Court of Appeals for the Third Circuit, reported at 321 F.3d 394 (3rd Cir. 2003) (Pet. App. 1-16), which affirmed the district court's grant, in part, of a preliminary injunction to respondent and affirmed the denial of petitioners' motion to dismiss. The district court subsequently issued a permanent injunction, in favor of respondent and others, from which an appeal to the Third Circuit is pending, and the VI Government passed legislation with respect to the matter that permits collection of taxes pending further judicial proceedings.

STATEMENT OF THE CASE

This case involves the question whether the VI Government and Martin violated the rights of Equivest when they refused to assess taxes on Equivest's real property according to its "actual value" as required by 48 U.S.C. § 1401a. The district court preliminarily enjoined the VI Government and Martin from employing a certain tax assessment method, concluding that it violated federal law. The sole issues raised by the VI Government and Martin in their interlocutory appeal were: (1) whether the district court lacked federal subject matter jurisdiction; and (2) whether the district court abused its discretion in rejecting their unclean hands argument. They did not challenge the district court's ruling on the merits. They raised the private right of action issue, which is a subject of their petition here, only in their motion for rehearing *en banc*, and did not raise the Revised Organic Act of 1954 issue, the other subject of their

petition, at all. Concluding that Congress, acting within its Constitutional discretion, created a dual system of federal and territorial taxation in the Virgin Islands, and that Equivest's action was properly brought under the federal component of the tax system governed by 48 U.S.C. § 1401a, the court of appeals held that the district court had federal subject matter jurisdiction.[1] Accordingly, the court of appeals affirmed the preliminary injunction. It later denied rehearing or rehearing *en banc*. Pet. App. 126-27.

This case is related to several other Virgin Islands tax cases. These cases have been consolidated with this case and the district court has issued a permanent injunction barring the same conduct that is the subject of the preliminary injunction, thus supplanting that injunction. The VI Government and Martin have appealed to the Third Circuit, and that appeal is pending.

In the first case, *Berne Corp. v. Gov't of the V.I.*, 120 F. Supp. 2d 528 (D. V.I. 2000) [*Berne I*], the district court held that two real property owners in the Virgin Islands had a private right of action under 48 U.S.C. § 1401a. *See Berne I*, 120 F. Supp. 2d at 533-535 (Pet. App. 42-45). *See also* Pet. 11. Following its analysis of the federal taxation rights granted under 48 U.S.C. § 1401a, the district court denied a motion to dismiss and preliminarily enjoined

> the Government of the Virgin Islands and Roy Martin, tax assessor, . . . from collecting property

1. The Third Circuit also ruled that the district court did not abuse its discretion in holding that no issue of clean hands barred issuance of a preliminary injunction. *See Bluebeard's Castle, Inc. v. Gov't of the V.I.*, 321 F.3d 394, 397 n.4 (3rd Cir. 2003) (Pet. App. 3 n.4) [*Equivest II*].

> taxes against the real property owned by [plaintiffs] until the tax assessor can establish at a trial on the merits that the property taxes on those properties have been assessed on their actual value in accordance with 48 U.S.C. § 1401a and 33 V.I.C. § 2404.

Id. at 537 (Pet. App. 50). As the district court later found, the VI Government then apparently settled *Berne I* "by agreeing to bring the Tax Assessor's assessment procedures and processes into compliance with the uniform national appraisal standards, and to appoint an independent special master to review for compliance." *Berne Corp. v. Gov't of the V.I.*, __ F. Supp. 2d __, 2003 WL 21078073, at *2 (D.V.I. May 12, 2003) (consolidated case) (Pet. App. 55) [*Berne II*]. As the district court noted, however, the VI Government subsequently "chose to ignore the *Berne* Settlement and relitigate the same issues in [*Equivest* and] other cases." *Id.*

When the VI Government assessed taxes against Equivest in a manner inconsistent with the district court's ruling in *Berne I* and the settlement in connection with that case, Equivest brought an action and sought a preliminary injunction. *See Equivest St. Thomas, Inc. v. Gov't of the V.I.*, 208 F. Supp. 2d 545 (D. V.I. 2002) (Pet. App. 17-32) [*Equivest I*]. As had plaintiffs in *Berne I*, Equivest alleged that the VI Government and Martin were violating federal law by denying Equivest its statutory right to have its property assessed at its "actual value" in accordance with 48 U.S.C. § 1401a. *Id.* at 546 (Pet. App. 17).

With respect to the private right of action issue, the district court in *Equivest I* held that "[r]elying on my analysis

in *Berne [I]*, I also find that Equivest has a valid section 1983 action." *See Berne [I]*, 120 F. Supp. 2d at 533-34 (finding that section 1401a creates a federally protected right actionable under section 1983). *Id.* at 548 n.6 (Pet. App. 21-22 n.6).[2] The district court also specifically reiterated its holding that 33 V.I.C. § 2404 "did not supercede the federal law or remove the local property tax from federal control. The federal requirement under section 1401a that the tax assessor use 'actual value' in assessing the tax remains in force and is unaffected by its territorial implementation." *Id.* at 548 (Pet. App. 20) (quoting *Berne I*, 120 F. Supp. 2d at 532-33).[3] Following an evaluation of the four preliminary injunction factors, the district court granted Equivest's motion for preliminary injunction with respect to the properties that satisfied the factors. *Equivest I*, 208 F. Supp. 2d at 549 (Pet. App. 24).

In their interlocutory appeal, the VI Government and Martin only raised issues of whether the district court lacked federal subject matter jurisdiction in light of certain territorial legislation and whether the district court abused its discretion in rejecting their unclean hands argument. The court of appeals agreed with the district court that section 1401a remained binding and effective following enactment of a real

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2. In *Equivest I*, the district court frequently referred to *Berne I*, rather than repeating its analysis.

3. The district court observed in *Equivest I* that, contrary to the impression created by the *Berne* settlement, the VI Government had "changed its position. Rather than putting all its efforts into correcting the tax assessment process and negotiating settlements on unlawfully assessed properties, the [VI Government] now seems to want to litigate these matters." *Equivest I*, 208 F. Supp. 2d at 552-53 (Pet. App. 31).

property assessment law by the Virgin Islands legislature in 1955. *Equivest II*, 321 F.3d at 399 (Pet. App. 8-9). When the Virgin Islands legislature enacted specific tax requirements at that time, those specific provisions supplanted the interim provisions contained in section 1401b, as expressly provided in that section. However, the "expiratory language in § 1401b applies only to the specific requirements of that section; it does not apply to the rest of the statute, including the general requirements of § 1401a." *Id.* (Pet. App. 8). Concluding that Equivest had "adequately alleged a violation under 48 U.S.C. § 1401a," the court of appeals held that Equivest's claims "'arise under' § 1401a" and "are subject to the jurisdiction of the District Court under 48 U.S.C. § 1612 and 28 U.S.C. § 1331." *Id.* at 402 (Pet. App. 14).[4]

The VI Government and Martin did not argue in their appeal to the Third Circuit, and the opinion in *Equivest II* did not address, the issue of a private right of action under 48 U.S.C. § 1401a. *Equivest II*, 321 F.3d 394 (Pet. App. 1-16).[5] Nor did they raise the Revised Organic Act issue. *Id.*

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4. Petitioners have misread the decision of the Third Circuit in this case by confusing the distinct issues of (1) a private right of action and (2) federal subject matter jurisdiction. In their petition, they state that "the Third Circuit held that § 1401a creates a private right of action . . ." Pet. 3. However, in connection with their interlocutory appeal, petitioners only raised—and the court of appeals therefore only addressed—the issue of federal subject matter jurisdiction, not whether respondent had a private right of action. *Equivest II*, 321 F.3d at 399-402 (Pet. App. 9-15).

5. Even though the district court had addressed the issue of a private right of action under 48 U.S.C. § 1401a and even though *Gonzaga University v. Doe*, 536 U.S. 273 (2002),was decided (Cont'd)

In the meantime, the district court held a trial in the consolidated actions brought against the VI Government and Martin by the *Berne* plaintiffs, the *Equivest* plaintiffs and several other plaintiff landowners. *See Berne II*, 2003 WL 21078073 at *1 (Pet. App. 59-60). On May 23, 2003, the district court issued a detailed opinion (Pet. App. 52-125) and entered a permanent injunction, enjoining assessment of taxes against the plaintiffs, including Equivest, until "a reliable and credible system that will appraise real property consistently at its actual, market value in compliance with 48 U.S.C. § 1401a" is established. *Id.* at *25 (Pet. App. 113). The district court also entered a permanent injunction, pursuant to 5 V.I.C. § 80, requiring the VI Government and Martin to comply with terms of the *Berne* settlement that was previously entered. *Id.* (Pet. App. 113). The VI Government and Martin have appealed the district court's order granting the permanent injunction in *Berne II* to the Third Circuit.

After the district court's ruling in *Berne II* and the filing of the petition here, the Virgin Islands legislature passed a bill that allows for interim collection of real property taxes, pending further judicial proceedings. Act of July 14, 2003, No. 6586, 2003 V.I. Sess. Laws __ (Opp. App. 1a-11a). The governor signed the bill, with certain line-item vetoes. *Id.* (Opp. App. 9a-11a).

(Cont'd)
approximately one-and-a-half months before the VI Government and Martin filed their brief with the Third Circuit, the VI Government and Martin did not raise the issue of a private right of action before the Third Circuit until they filed a motion for rehearing *en banc*, which was denied without further briefing. Pet. App. 126-127.

REASONS FOR DENYING THE PETITION

The petition seeks review of a preliminary injunction that has now been supplanted by a broader permanent injunction and is on appeal. If this Court were to consider any issues arising from the related Virgin Islands tax cases, it should do so only after the court of appeals has addressed them in the context of the permanent injunction.

The court of appeals, in considering petitioners' interlocutory appeal here, correctly applied established principles regarding statutory interpretation and federal question jurisdiction in affirming the findings of the district court that: (1) the general federal tax requirements adopted by Congress in 48 U.S.C. § 1401a were not superceded by the enactment of certain specific requirements by the Virgin Islands legislature; (2) Equivest's claims "adequately alleged a violation under 48 U.S.C. § 1401a"; and (3) Equivest's claims "'arise under' § 1401a" and "are subject to the jurisdiction of the District Court under 48 U.S.C. § 1612 and 28 U.S.C. § 1331." *Equivest II*, 321 F.3d at 402 (Pet. App. 14). The decision below, which affirmed the interlocutory order, contains no ruling worthy of review.

In fact, petitioners have not challenged any of the actual holdings of the court of appeals in their petition. Instead, they raise in their question presented two new issues that could have been, but were not, developed before the court of appeals. The first issue was only raised in a motion for rehearing *en banc*, although no new decisions had been issued between the time petitioners filed their brief with the court of appeals and the time they filed their motion,[6] and the

6. The first issue presented by petitioners is whether respondent had a private right of action under 48 U.S.C. § 1401a, an issue that was answered affirmatively by the district court.

second issue has never been raised in any of the proceedings or submissions of the parties prior to the petition.[7] Because the two issues could have been, but were not, presented to the court of appeals in connection with its original decision and because petitioners do not challenge any of the holdings of the court of appeals, nothing in the petition warrants further review. Moreover, if either of the issues presented warranted review, it should occur in the context of the Third Circuit's ruling on the pending appeal of the permanent injunction directed to the same underlying conduct that is the subject of the superceded interlocutory ruling as to which petitioners seek review now.

ARGUMENT

I. There are No Special Circumstances in this Case Warranting Review of An Appeal of an Interlocutory Order.

In *Equivest I*, the district court granted respondent's request for a preliminary injunction, in part, and denied petitioners' motion to dismiss. *See Equivest I*, 208 F. Supp. 2d at 546 (Pet. App. 18). The district court, in its order, indicated that a trial on the merits would be set promptly. *Id.* at 551-52 (Pet. App. 29). Both aspects of the district court's order were interlocutory. *See* 28 U.S.C. § 1292(a)(1) (authorizing appeal of interlocutory orders granting injunctions); *Organization for a Better Austin v. Keefe*, 402 U.S. 415,420 (1971) (Harlan, J., dissenting) ("Review of preliminary injunctions is a classic form of interlocutory

7. The second issue presented by petitioners relates to whether a statute passed in 1954, as amended, repealed 48 U.S.C. § 1401a by implication.

appeal . . ."); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (noting that district court denied a motion to dismiss and certified its decision for interlocutory appeal); *Braden v. University of Pittsburgh*, 552 F.2d 948, 965 (3rd Cir. 1977) (Garth, J., concurring.) ("[T]his case is before us on interlocutory appeal from an order of the district court which did no more than to deny [appellant's] motion to dismiss [appellee's] complaint under Fed. R. Civ. Proc. 12 (b)(6)."). The court of appeals affirmed the district court's interlocutory order. *See Equivest II*, 321 F.3d at 402-03 (Pet. App. 15-16). Absent compelling circumstances, this Court does issue a writ of certiorari when it is presented with an appeal from an interlocutory order. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) (denying the petition "because the Court of Appeals remanded the case [and thus it] is not yet ripe for review by this Court"). *See also American Construction Co. v. Jacksonville, T. & K.W. Railway Co.*, 148 U.S. 372, 384 (1893) ("this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause").

Consideration of an interlocutory appeal would be particularly premature in this case because the district court has already conducted a trial and issued a permanent injunction. *See Berne II*, 2003 WL 21078073 at *29-31 (Pet. App. 121-125).[8] Additionally, petitioners have already appealed the final judgment in *Berne II*, which granted a

8. *Berne II* is a consolidated action involving the *Equivest* plaintiffs, the *Berne* plaintiffs, and other plaintiffs. *See Berne II*, 2003 WL 21078073 at *1 (Pet. App. 52).

permanent injunction to Equivest and other landowners, to the Third Circuit.[9] In *Berne I*, the district court performed a full analysis of the private right of action issue. *Berne I*, 120 F. Supp. 2d at 534-35 (Pet. App. 42-45). If petitioners have properly preserved the arguments, and if they choose to do so, they will have the opportunity to raise in the court of appeals in *Berne III* the issues presented in their petition, where they may, for the first time, be properly briefed by the parties and considered by the court of appeals. Therefore, the petition should be denied in light of its interlocutory nature and the fact that a superceding permanent injunction is currently on appeal to the Third Circuit.

Legislation passed by the Virgin Islands subsequent to the filing of the petition further eliminates any need for review by this Court. On July 1, 2003, the Virgin Islands legislature passed Bill No. 25-0039, to allow petitioners to collect taxes for tax years 1999 through 2004 based upon the real property assessments utilized in 1998, with the ability to seek adjustments for those years in the event a new and compliant tax system results in higher assessments. *See* Act of July 14, 2003, No. 6586, 2003 V.I. Sess. Laws __ (Opp. App. 1a-11a). On July 14, 2003, the governor signed the bill, with certain line-item vetoes not relevant to the interim collection of real property taxes. *Id.* (Opp. App. 9a-11a).

Petitioners contend that the district court's ruling has created a "financial crisis" and, at least implicitly, suggest that this Court should review the case to address the "crisis." Pet. 3-4. The passage of recent legislation, however, permits collection of taxes pending further judicial proceedings, thus

9. The appeal to the Third Circuit of *Berne II*, *Berne Corp., et al. v. Gov't of the V.I., et al.*, No. 03-2549 (3rd Cir., docketed, May 28, 2003), will be designated as *Berne III* in this Opposition.

resolving any alleged financial crisis arising from the granting of a permanent injunction.[10]

II. The Court Should Not Grant the Petition, Vacate and Remand ("GVR") or Grant the Petition to Hear this Case Because the Question Presented Was Not Raised Below and Petitioners Have Not Properly Preserved The Issues.

Petitioners' question presented claims to seek a GVR based upon either *Gonzaga University v. Doe*, 536 U.S. 273 (2002) or the Revised Organic Act of 1954.[11] However, neither of these arguments was made in petitioners' brief on the merits in the court of appeals, or addressed in its opinion. Nor is either of these arguments founded on decisions or other

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10. The district court's preliminary injunction applied only to Equivest's two properties, the absence of tax revenue from which could hardly precipitate a financial crisis. *Equivest I*, 208 F. Supp.2d 545 (Pet. App. 17-32). The district court's permanent injunction, which is not before this Court, has broader application.

11. Strictly speaking, while petitioners claim to be seeking a GVR, they are not. Instead, petitioners are seeking a summary disposition on the merits on two issues that were not briefed before the court of appeals. *See* Pet. 14 (Petitioners ask this Court to "grant certiorari, vacate the judgment below, and remand this case ('GVR') to the Third Circuit with instructions to dismiss the case for lack of subject matter jurisdiction."). If petitioners were actually seeking a GVR, they would instead request that this Court remand to the court of appeals for further consideration in light of *Gonzaga*. Perhaps petitioners have adopted this unorthodox approach in light of their failure to raise the issues asserted in this petition before the court of appeals and knowing that *Gonzaga* was decided before they submitted their brief to the court of appeals.

intervening factors subsequent to the decision of the court of appeals. *See Equivest II*, 321 F.3d 394 (Pet. App. 1-16).

The district court opinion in this case held that there was a private right of action under 42 U.S.C. § 1983 arising from a violation of the right to an assessment at the "actual value" contained in 48 U.S.C. § 1401a. *See Equivest I*, 208 F. Supp. 2d at 548, n.6 (Pet. App. 21-22 n.6). The district court relied upon its detailed analysis of the private right of action issue in *Berne I*, which is consistent with the holding and principles contained in *Gonzaga*. *See Berne I*, 120 F. Supp. 2d at 534-35 (Pet. App. 42-45).[12]

In their appeal to the Third Circuit, petitioners did not raise either the *Gonzaga* private right of action issue or the argument that 48 U.S.C. § 1401a was impliedly repealed by the Revised Organic Act of 1954, as amended, 48 U.S.C. §§ 1541-1645 (the "ROA"), even though *Gonzaga* was decided well before the petitioners submitted their brief to the Third Circuit[13] and the ROA was enacted in 1954.

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12. *See* Section III.A., *infra*, for an evaluation of *Berne I*'s consistency with *Gonzaga*.

13. As noted, petitioners raised the private right of action issue in their motion for rehearing *en banc*. *See* n.5, *supra*. However, petitioners were aware of this issue when they filed their appeal because the requirement of a private right of action was addressed by the district court and because it is a long-standing concept. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377 (1982) ("In 1975 the Court unanimously decided to modify its approach to the question whether a federal statute includes a private right of action.").

Therefore, it cannot be said that an intervening event or decision would support a GVR in this case because petitioners had ample notice of *Gonzaga* and the ROA, but either failed to—or decided not to—raise those issues below. Given that petitioners did not appeal on these issues and that they were not briefed in connection with the court of appeals' decision, this Court should abide by its practice "to decide cases on the grounds raised and considered in the Court of Appeals . . ." and decline to issue a GVR or to grant the petition. *Owasso Independent School District v. Falvo*, 534 U.S. 426, 431 (2002) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998)); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("ordinarily, this Court does not decide questions not raised or involved in the lower court").

Petitioners attempt to address their failure to raise in the courts below the questions presented in their petition by claiming that the issues raised relate to federal subject matter jurisdiction, which can be raised at any time. However, this Court has determined that the existence of a private right of action is a separate legal concept from federal subject matter jurisdiction. *See National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 456 (1974). *See also Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 520 (3rd Cir. 1998) ("The Supreme Court has recognized that the question of whether a statute creates a private right of action is distinct from the question of whether a federal court has jurisdiction.") (citing *National Railroad Passenger Corp.*, 414 U.S. at 456). While a court would ordinarily address the question of a private right of action first, *see National Railroad Passenger Corp.*, 414 U.S. at 456, the issue may be waived because it is distinct from federal subject matter jurisdiction. *See Hopp v. The City of Pittsburgh*, 194 F.3d 434, 440 (3rd Cir. 1999) (holding that

appellant waived its challenge based upon lack of a private right of action under 42 U.S.C. § 1981 by failing to timely assert the argument). Because the issue of a "private right of action" is not jurisdictional, and may be waived, the Fourth Circuit recently ruled—on remand for reconsideration in light of *Gonzaga*—that appellants' failure properly to raise the issue in the court of appeals resulted in a waiver of the potential argument. *See National Home Equity Mortgage Association v. Face*, 322 F.3d 802 (4th Cir. 2003). Similarly, if the Court were to issue a GVR in this case, the Third Circuit would be presented with the unappealed holding of the district court that 48 U.S.C. § 1401a creates a private right of action for landowners in the Virgin Islands and that respondent prevailed on that right of action. As was the case in *National Home*, it would be appropriate in these circumstances for the Third Circuit to affirm its previous decision based upon a waiver of the "private right of action" issue and defer any consideration of the issue to the pending appeal of the order entering a permanent injunction, if the argument is properly presented there.

III. There Is No Need to Grant the Petition or GVR Based Upon An Asserted Lack of a Private Right of Action or the Revised Organic Act of 1954 Because Consideration of Those Issues Will Not Alter the Result in this Case

A. The Asserted Lack of a Private Right of Action

Prior to filing this petition, petitioners sought rehearing by the court of appeals, asserting that its opinion conflicted with *Gonzaga's* holding regarding private rights of action. *See* Pet. 2. The court of appeals denied rehearing, both by the deciding panel and *en banc*. *See* Pet. App. 126-27.

Thus, while respondent did not have the opportunity to respond to petitioners' argument regarding the impact, if any, of *Gonzaga* on this case, the court of appeals has already denied rehearing when presented with these arguments.

In addition to the reasons stated above, there is no merits-based justification for granting the petition here because the decision of the court of appeals was correct and the district court's analysis of the private right of action issue was consistent with *Gonzaga*.[14] The district court in *Berne I* affirmatively determined that a violation of 48 U.S.C. § 1401a's requirement that land be taxed at its "actual value" results in a "deprivation of . . . rights, privileges, or immunities secured by the Constitution and laws." *Berne I*, 120 F. Supp. 2d at 533-35 (Pet. App. 42-45) (quoting 42 U.S.C. § 1983). The district court in *Berne I* held that "48 U.S.C. § 1401a creates a federally protected *right* actionable pursuant to 42 U.S.C. § 1983." *Id.* at 535 (Pet. App. 44-45) (emphasis added). Section 1401a "was intended to benefit taxpayers by creating uniformity of taxation and reducing the burdens of taxation on land (and thus landowners such as plaintiffs) in productive use." *Id.* (Pet. App. 44). As petitioners acknowledge, the district court "based [its] analysis on [this] Court's decisions in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), and *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498

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14. Even if the court of appeals' decision was in error (which it was not), review would not be justified on that basis because this Court is not a court of error correction. *See* Robert L. Stern et al., *Supreme Court Practice* 321 (8th ed. 2002) (quoting Address of Chief Justice Vinson before the American Bar Association, Sept. 7, 1949) ("[T]he Supreme Court 'is not and never has been, primarily concerned with the correction of errors in lower court decisions.' ") (citation omitted).

(1990)." (Pet. 11-12 n.5). *Gonzaga*, which cites *Golden State* with approval, would not dictate a different result.[15]

Additionally, this is not, as was *Gonzaga*, a Spending Clause case. Here, the right of landowners to be taxed upon the actual value of their property was explicitly created by Congress in 48 U.S.C. § 1401a under its broad power to govern territories under the United States Constitution. *See* U.S. Const. art. IV, § 3, cl. 2. ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ."). In contrast, *Gonzaga* expressly dealt with attempts by a person to create an action based upon a purported interest arising in connection with

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15. Moreover, the petition attempts to treat this case as an implied right of action case, rather than a section 1983 case, asserting that:

> Even assuming, *arguendo*, that § 1401a creates a private right of action for Virgin Islands landowners . . . , "a plaintiff suing under an implied right of action still must show that the statute manifest an intent 'to create not just a private *right* but also a private *remedy*.'" *Gonzaga Univ.*, 536 U.S. at 284 (emphasis in original).

Pet. 21. The district court specifically held, however, that respondent's claim was actionable under 42 U.S.C. § 1983. *See Equivest I*, 208 F. Supp. 2d at 548 n.6 (Pet. App. 21-22) (citing *Berne I*, 120 F. Supp.2d at 533-34 (Pet. App. 40-42)) (holding "that Equivest has valid section 1983 action"). In this Section 1983 case, *Gonzaga* specifically requires that the statute need only confer a right, not a remedy, because the remedy is implied from section 1983. *See Gonzaga*, 536 U.S. at 284 ("Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes.").

"spending legislation."[16] If *Gonzaga* is to be analyzed in the context of Congress' explicit power to legislate over the territories, it should be in a setting where the private right of action issue has been fully briefed and carefully considered by the court of appeals. Therefore, if the private right of action issue is ever to be worthy of consideration by this Court in the context of 48 U.S.C. § 1401a, it should not occur in the context of this appeal of an interlocutory ruling.

B. The Revised Organic Act of 1954 ("ROA")

Petitioners raise the argument that the ROA may have silently repealed 48 U.S.C. § 1401a for the first time in their petition. As they acknowledge, the ROA only superceded the laws applicable to the Virgin Islands that addressed the same issues. Pet. 23. Petitioners then note that the ROA superceded the bulk of the Organic Act of 1936. *Id.* The 1954 Revised Organic Act, however, did not purport to, and did not, supercede other laws, including Section 1401a, notwithstanding petitioners' unfounded assertions to the contrary. Section 1401a remains effective. *See Equivest II*, 321 F.3d at 399 (Pet. App. 8-9). It is for the U.S. Congress to determine whether that law should be repealed. Again, if the Court is ever to consider this issue, it should be in the context of a case where the issue has been briefed and considered in the courts below.

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16. *See Gonzaga*, 536 U.S. at 279 ("But we have never before held, and decline to do so here, that *spending legislation* drafted in terms resembling those of FERPA can confer enforceable rights.") (emphasis added); *Id.* at 281 ("Our more recent decisions, however, have rejected attempts to infer enforceable rights from *Spending Clause statutes*.") (emphasis added); *Id.* at 290 ("FERPA's nondisclosure provisions . . . serve primarily to direct the Secretary of Education's *distribution of public funds to educational institutions*.") (emphasis added).

CONCLUSION

The court of appeals' decision applies sound principles of law to the issues presented on appeal from an interlocutory order. Petitioners do not challenge any of the actual holdings of the court of appeals. There is no justification for this Court to consider two new issues that could have been, but were not, raised before the court of appeals. The petition for a writ of certiorari should accordingly be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

ACT NO. 6586

BILL NO. 25-0039

TWENTY-FIFTH LEGISLATURE OF THE VIRGIN ISLANDS

OF THE UNITED STATES

Regular Session

2003

To amend title 33, Virgin Islands Code, sections 2402, 2452, 2453 and add section 2456, relating to the assessment and collection of real property taxes, to provide for other related purposes, and to repeal Act 6574

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BE IT ENACTED by the Legislature of the Virgin Islands:

SECTION 1. The Legislature finds and declares that:

~~(a) It is a federal mandate of Congress and the policy of the Legislature of the Virgin Islands to equalize and more equitably distribute taxes on real property in the Virgin Islands and to reduce the burden of taxation now imposed on land in productive use in the Territory;~~

~~(b) Congress, through the Revised Organic Act of the Virgin Islands, 48 U.S.C. §1401a, commands the Territory to establish and implement a real property tax system based on the actual value of the real property;~~

~~(c) The District Court of the Virgin Islands has ruled that the statutory framework for taxing real property and the administration of the taxing system by the Virgin Islands Tax Assessor and the Board of Tax Review violate federal and Virgin Islands law;~~

~~(d) The District Court in *Berne Corp. et. al. v. the Government of the Virgin Islands*, et. al. Civil Nos. 2000-141, 2000-167, 2001-151, 2001-155, 2001-181, 2001-196, 2001-197, 2001-228, and 2002-057 ("the Property Tax Litigation") has decreed that the Government shall make no further effort to collect any tax bills already issued for any real property for tax years 1999, 2000, and 2001, nor may the Government issue any tax bills for the tax year 2002 and beyond, unless provisions are made for adjustment of tax bills until such time as the tax system is revised to reliably assess all classes of real property at actual value;~~

(e) The Virgin Islands is experiencing a severe fiscal crisis that threatens the financial stability of the Government and its institutions;

(f) A protracted injunction against collecting real property taxes would have Draconian consequences for the Government and the people of the Virgin Islands;

(g) To defray the costs of complying with the Decree in the Property Tax Litigation and the cost of revising the property tax system of the Virgin Islands ~~to comply with 48 U.S.C. §1401a~~, it is crucial that Government collect property tax revenues expeditiously; and

(h) To fulfill its fiduciary duty to the people of the Virgin Islands to promote and ensure the public health, safety and general welfare by ensuring the collection of sufficient revenues to provide for adequate government services and to develop a fair and equitable property tax system, the measures set forth in this Act must be executed faithfully.

SECTION 2. ~~The Government and the Tax Assessor shall bring the Virgin Islands real property tax system into compliance with the federal mandate of 48 U.S.C. §1401a that real property be assessed based on its actual value, and into accordance with the Uniform Standards of Professional Appraisal Practice or other appropriate nationally recognized standards.~~

SECTION 3. Notwithstanding title 33, Virgin Islands Code, section 2402, the Tax Assessor may issue tax bills and collect taxes at the 1998 assessment level, for all classes of real property, including commercial and non commercial real property, for the tax years 1999, 2000, 2001, 2002, 2003 and 2004, before the revision of the property tax ~~system required by section 2 of this Act~~ and by the Property Tax Litigation, provided the tax due shall be subject to adjustment for each year according to the assessed value based on ~~actual value when~~ the new system ~~is~~ implemented. The taxpayer shall be entitled to a credit applied to his subsequent years' tax bills

or a refund for any over-payment that may have accrued as the result of the payment of any of his tax bills for any year from 1999 until the new system is implemented. In the case of an underpayment of the taxes paid pursuant to this section, the taxpayer may be billed for any prior years' real property tax obligations and shall have 120 days in which to pay the sum due, without penalty or interest otherwise due under title 33, Virgin Islands Code, chapter 89, section 2494.

SECTION 4. Title 33, section 2452, Virgin Islands Code, is amended by striking "sixty (60)" and by inserting in lieu thereof the "one hundred twenty (120)".

SECTION 5. Title 33, Virgin Islands Code, section 2453 is amended by re-designating subsection (c) as subsection (d) and inserting a new subsection (c) to read as follows:

"(c) The Board of Tax Review shall designate a hearing officer, qualified by training or experience in the areas of law, tax, or accounting, to conduct hearings under this chapter, to compile evidence and establish findings of fact, but the final substantive decision in all appeals or complaints under this chapter shall be made by the Board of Tax Review."

SECTION 6. Title 33, chapter 87, Virgin Islands Code, is amended by adding a section 2456 to read as follows:

"§2456. Office of the Tax Assessor Revolving Fund

(a) There is established in the Treasury of the Government of the Virgin Islands a separate and distinct fund designated as "The Office of the Tax Assessor's Revolving

Fund." The Commissioner of Finance shall provide for the administration of the Fund, and no monies shall be available for expenditure from the Fund except as provided by this section.

(b) The Fund shall consist of one percent of the real property taxes collected annually by the Commissioner of Finance or an amount not to exceed $500,000 per annum, and such sums as may be appropriated from time to time by the Legislature, all of which shall remain available until expended.

(c) Monies shall be disbursed from the Fund by the Commissioner of Finance upon the authorization of the Lieutenant Governor, for the purpose of purchasing and maintaining data processing equipment, for staffing and training of personnel, and for the purchase and procurement of such other necessary supplies, equipment and professional services as may be determined to be necessary by the Lieutenant Governor for maintaining and improving the Office of the Tax Assessor.

(d) The Commissioner of Finance shall maintain a record of all monies deposited into and disbursed from the Fund and shall annually report to the Governor and the Legislature on the status of the Fund.

(e) Unless extended by the Legislature, the authorization for this Fund shall expire on October 1, 2008."

SECTION 7. The sum of $1,600,000 is appropriated in the fiscal year ending September 30, 2003, from the property taxes collected pursuant to section 3 of this Act to The Actual Value Property Tax Assessment Fund, established by the Commissioner of Finance pursuant to paragraph 4 of the Decree entered on May 12, 2003, in the Property Tax Litigation. The sum shall remain available until expended.

SECTION 8. Notwithstanding title 33, Virgin Islands Code, section 2402 (a) or any other law to the contrary, the next assessment of commercial and non-commercial property shall occur in the year 2005, and biennially thereafter.

SECTION 9. (a) The Tax Study Commission established under section 3 (c) of Act No. 6391, shall analyze and make recommendations for the adjustment of the 1.25 percent millage rate ~~established in 48 U.S.C. § 1401b~~ and shall submit a report and its recommendations to the Governor and to the Legislature within 180 days after the effective date of this Act.

(b) The Law Revision Commission established under title 1, Virgin Islands Code, section 275, in conjunction with The Tax Study Commission and the Tax Assessor's Office, shall recommend needed changes to the property tax code to bring property tax laws into ~~compliance with the requirements of 48 U.S.C. § 1401a and in~~ harmony with modern times and conditions, and shall submit to the Governor and to the Legislature within 270 days after the effective date of this Act, a report on their findings and recommendations, including proposed draft legislation.

SECTION 10. Pursuant to title 3, Virgin Islands Code, section 180, subsection (h), the Governor shall submit to the Legislature within 30 days after the effective date of this Act, the names of nominees selected to fill any vacancies on the Board Tax Review.

SECTION 11. Act No. 6574 (Bill No. 25-0003) is repealed.

SECTION 12. Severability. Each section and each provision of this Act stand alone, and if any provision in this Act has been held, or in the future is held, to be unconstitutional, preempted by federal law, or otherwise invalid by any court of competent jurisdiction, all of the other provisions set forth in this Act are intended to, and shall remain, fully effective and shall be interpreted to exclude the unconstitutional, preempted, or otherwise invalid provision. If any section, subsection, paragraph, sentence, clause, word, or portion of this Act is for any reason held to be unconstitutional, preempted by federal law, or otherwise invalid, that holding shall not effect the remaining portions of this Act. The Legislature expressly declares that it would have enacted this Act and each section, subsection, paragraph, sentence, clause, word, or portion thereof despite the fact that one or more sections, subsections, paragraphs, sentences, clauses, words, or portions of this Act may be held unconstitutional, preempted by federal law, or otherwise invalid.

Thus passed by the Legislature of the Virgin Islands on June 18, 2003.

Appendix

Witness our Hands and the Seal of the Legislature of the Virgin Islands this 1st Day of July, A.D., 2003.

s/ David S. Jones
David S. Jones
President

s/ Shawn-Michael Malone
Shawn-Michael Malone
Legislative Secretary

Appendix

THE UNITED STATES VIRGIN ISLANDS
OFFICE OF THE GOVERNOR
GOVERNMENT HOUSE
Charlotte, Amalie, V.I. 00802
340-774-0001

THE GOVERNOR'S OBJECTIONS

Bill No. 25-0039 is hereby approved with the exception of the following items, part or parts, portion or portions thereof, which are nereby objected to (and deleted and disapproved in full) pursuant to Section 9(d) of the Revised Organic Act of 1954, as amended:

SECTION 1.

(a) It is a federal mandate of Congress and the policy of the Legislature of the Virgin Islands to equalize and more equitably distribute taxes on real property in the Virgin Islands and to reduce the burden of taxation now imposed on land in productive use in the Territory;

(b) Congress, through the Revised Organic Act of the Virgin Islands, 48 U.S.C. §1401a, commands the Territory to establish and implement a real property tax system based on the actual value of the real property;

(c) The District Court of the Virgin Islands has ruled that the statutory framework for taxing real property and the administration of the taxing system by the Virgin Islands Tax Assessor and the Board of Tax Review violate federal and Virgin Islands law;

(d) The District Court in *Berne Corp. et. al. v. the Government of the Virgin Islands, et. al.* Civil Nos 2000-141, 2000-167, 2001-151, 2001-155, 2001-181, 2001-196, 2001-197, 2001-228, and 2002-057, ("the Property Tax Litigation") has decreed that the Government shall make no further effort to collect any tax bills already issued for any real property for tax years 1999, 2000, and 2001, nor may the Government issue any tax bills for the tax year 2002 and beyond, unless provisions are made for adjustment of tax bills until such time as the tax system is revised to reliably assess all classes of real property at actual value;

* * *

(g)

* * *

to comply with 48 U.S.C. §1401a

* * *

SECTION 2. The Governor and the Tax Assessor shall bring the Virgin Islands real property tax system into compliance with the federal mandate of 48 U.S.C. §1401a that real property be assessed based on its actual value, and into accordance with the Uniform Standards of Professional Appraisal Practice or other appropriate nationally recognized standards.

Appendix

SECTION 3.

system required by section 2 of this Act . . . actual value when is

SECTION 9.

(a) established in 48 U.S.C. §1401(b)

(b) compliance with the requirements of 48 U.S.C. §1401a and in

Witness my hand and the Seal of the Government of the United States Virgin Islands at Charlotte Amalie, St. Thomas, Virgin Islands, this 14th day of July, A.D., 2003.

s/ Charles W. Turnbull
Charles W. Turnbull
Governor